Supreme Court, FILED
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No. 05-44

IN THE

Supreme Court of the United States

KENNETH STEVEN SHAPIRO,

Petitioner,

v.

STATE BOARD OF ACCOUNTANCY, COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an ambiguous statute relied upon and interpreted by the Respondent in an administrative agency disciplinary proceeding relative to the Petitioner's "right to practice" before a federal or state agency is constitutionally deficient?

2. Whether Petitioner was denied his fundamental due process rights when Respondent refused to provide him with a meaningful hearing and opportunity to present evidence, cross-examine witnesses, and contest unproven allegations in an administrative disciplinary licensing proceeding?

PARTIES TO THE PROCEEDING

Petitioner Kenneth Steven Shapiro is a citizen and resident of the Commonwealth of Pennsylvania. Respondent State Board of Accountancy, Commonwealth of Pennsylvania, is an administrative agency operating in the Commonwealth under the auspices of the Bureau of Professional and Occupational Affairs in Harrisburg, the state capitol.

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OPINIONS BELOW

The Adjudication and Order of the State Board of Accountancy dated October 10, 2003 revoking the biennial license of the Petitioner to practice as a certified public accountant in the Commonwealth of Pennsylvania (effective November 10, 2003) is an unreported decision and has been reproduced and is included in the Appendix to this Petition.

The opinion of the Commonwealth Court of Pennsylvania affirming the decision of the State Board of Accountancy is reported at 856 A.2d 864 (Pa. Commonwealth 2004), reargument and/or reconsideration denied September 17, 2004 and has been reproduced and is included in the Appendix to this Petition.

The Supreme Court of Pennsylvania issued no opinion in its denial of the Petition of the Allowance of Appeal by Order on April 12, 2005. The Order denying the Petition for Allowance of Appeal is reported at 872 A.2d 174 (Pa. 2005), and has been reproduced and is included in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on April 12, 2005. This was a final decision from the highest appellate court of the Commonwealth of Pennsylvania. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

Constitution of the Commonwealth of Pennsylvania, Article 1, Section 1:

Article 1 – Declaration of Rights

That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE THAT –

Section 1. Inherent Rights of Mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending liberty and liberty, or acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Title 63 Pennsylvania Consolidated Statutes: CPA Law

§ 9.9a. Grounds for discipline

(a) In accordance with the procedure provided in section 9 of this act, the board may revoke, suspend, limit or otherwise restrict the

certificate of a certified public accountant or the registration of a public accountant, may revoke, suspend, limit or otherwise restrict any license issued under this act, may censure or publicly reprimand the holder of any certificate, registration or license, may require completion of general or a specific number of continuing professional education courses or may require more frequent peer review or other remedial action for any one or any combination of the following causes: ...

(8) Suspension or revocation of the right to practice before any Federal or State governmental agency...

(16) Engaging in unprofessional conduct. Discipline may be imposed under this clause whether or not actual injury or loss to a client is established...

(a) For the purpose of this section only, "unprofessional conduct" means"

(1) undertaking to perform professional services that the certified public accountant, public accountant or firm cannot reasonably expect to complete with professional competence;

(2) failure to exercise due professional care in the performance of professional services;

(3) failure to adequately plan and supervise the performance of professional services;

(4) failure to obtain sufficient data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed; or

(5) failure to comply with any standard promulgated by any recognized public or private standard-setting body that is applicable to the professional service being performed.

STATEMENT OF THE CASE

Petitioner was issued a certificate of certified public accounting and a license to practice public accounting in the Commonwealth of Pennsylvania, License No. CA-013872-L, on January 29, 1979. From 1983 through February 1999, Petitioner also served as president and was registered as a general securities principal of Welco Securities, Inc., a Nevada Corporation. ("Welco").

Welco was registered as a broker-dealer of securities with the Securities and Exchange Commission ("SEC") and Pennsylvania Securities Commission ("PSC") from 1983 until such time as an application for its withdrawal from registration, accompanied by a final FOCUS report of financial condition dated as of February 19, 1999, was filed with the National Association of Securities Dealers' Central Regulation Depository ("NASD-CRD") on or about March 2, 1999. Petitioner did not provide professional services to Welco in his capacity as a certified public accountant. Outside independent auditors were engaged to perform Welco's auditing and accounting services.

From 1983 through early 1997, Welco offered securities to the public issued by Walnut Equipment Leasing Co., Inc. ("Walnut") and Equipment Leasing Corporation of America ("ELCOA") pursuant to tombstone advertisements pursuant to Rule 134 of the Securities Act of 1933, and by means of effectively registered prospectuses issued pursuant to Section 6 of the Securities Act of 1933 (15 U.S.C. Sec. 77f).

Prospective investors were warned of the significant risks in investing in these securities. As noted in the prospectuses publicly available through the SEC's website (www.sec.gov), Welco engaged the services of outside independent underwriters as required by Schedule E to the NASD By-Laws who opined on the fairness of the offerings of the securities to the public. As noted in the prospectuses, from time to time, securities dealers other than Welco offered the securities of Walnut and ELCOA to their clients. All sales were made by means of an application signed by the purchaser prior to purchase certifying that they had received the most recently registered prospectus for either Walnut or ELCOA (the last of which were effectively registered on January 31, 1997). Every application for purchase included disclosures from each prospective investor relative to their income, net worth, and investment objective for purposes of determining the suitability of the investor to purchase registered securities offered through Welco.

As a result of an inability to achieve sufficient levels of new lease volume to achieve a profitable level of operations, Walnut and ELCOA filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code with the U. S. Bankruptcy Court for the Eastern District of Pennsylvania on August 8, 1997 (Dockets # 97-19699 and 97-19700, respectively). Sales of securities for Walnut and ELCOA through Welco had ceased long before the filing date. Walnut and

ELCOA continued to operate post-petition under the same management as debtors-in-possession in an effort to maximize the recovery to their unsecured certificate holders. Publicly available records at the U.S. Bankruptcy Court reveal that Petitioner's immediate family members constituted the largest single composite group of investors, and that significant funds were repaid to investors in the course of the bankruptcy proceedings.

As a result of settlement negotiations approximately six months after Welco filed its notice on February 23, 1999 to voluntarily terminate its activities with the NASD-CRD and various state securities agencies, (including Pennsylvania), the SEC filed a Complaint against Welco and the Petitioners alleging violations of the Securities Exchange Act of 1934. As part of the settlement agreement, on August 19, 1999, the Petitioner consented, without either admitting or denying the allegations made by the SEC, to the entry of a Final Judgment and Order for a Permanent Injunction by the United States District Court for the Eastern District of Pennsylvania. Under the settlement agreement, the registration of Welco as a broker-dealer was "revoked" and the Petitioner was permanently barred from becoming a registered representative or registered principal with any broker-dealer registered under the Securities Exchange Act of 1934. The Order did not affect Petitioner's right to practice as a certified public accountant before the SEC.

During December 1999 Petitioner, solely for purposes of concluding other ongoing and protracted proceedings, entered into an "Offer of Settlement" and consented to the issuance by the PSC of a document entitled "Findings of Fact, Conclusions of Law, and Order" without admitting or denying the allegations contained therein. The PSC's Order clearly stated that the documents' sole purpose was to con-

clude the ongoing administrative proceedings. Petitioners neither admitted nor denied any of the PSC's allegations, nor did either Petitioner affirmatively concede or agree with any of the statements made by the PSC, which were issued solely for the purposes of concluding the proceedings before it and for no other purpose. Nothing in the SEC or PSC's Orders restricted or inhibited the ability of Petitioner to represent himself or clients in any professional capacity before the SEC, PSC or any other state agency. In the document entitled "Findings of Fact, Conclusions of Law, and Order", the PSC made no specific findings of fact or identified with any specificity a single failure or violation by the Respondent after February 3, 1997 of any duty to his clients in a professional capacity or identify any specific deceptive, manipulative or fraudulent behavior with regards to the sale of securities.

On or about December 20, 2001, the Commonwealth of Pennsylvania filed Amended Orders to Show Cause requiring Petitioner to respond to factual allegations and purportedly applicable law as to why his license to practice as Certified Public Accountant should not be suspended, revoked, or otherwise restricted. The Commonwealth's actions were initiated pursuant to the CPA Law, as amended, December 8, 1976, P.L. 1280, No. 286, (Act), 63 P.S. § 9.1 et. seq. In support of the Commonwealth's requests were two exhibits attached to the Amended Order to Show Cause. Exhibit 1 to the order was a copy of the Pennsylvania Securities Commission's Findings of Fact, Conclusions of Law and Order, issued and entered on December 22, 1999 (Docket No. 9707-07). Exhibit 2 consisted of a copy of an "Order Instituting Public Proceedings, Making Findings and Imposing Remedial Sanctions against Respondent", released by the